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Dissatisfaction with recent decisions against the constitutionality of certain laws designed to improve social conditions has been widespread and outspoken. Critics have imputed to courts a Bourbonism which almost denies the community's right to make social change if the necessary legislation imposes even theoretical hardship on individuals. The dissatisfaction is intensified by a feeling that questions of legislative competency should be determined by the legislature or by the people and do not properly concern a court. Much that has been said betrays conceptions so divergent that it seems worth while to go back of the disputed decisions and consider something of the principles of constitutional limitations in general, the theory and effect of the method by which we enforce them now, and the results which proposed changes of method would be likely to produce.

It is nothing new to challenge the censorship which judges exercise over statutes to refuse them enforcement if contrary to the constitution. "No veto power, ancient or modern," wrote Jefferson, "ever existed so formidable as this American, irresponsible judicial veto, a power to dismiss laws as the President may dismiss officers under him." Mr. Roosevelt today more aptly stigmatizes the practice as "judicial nullification"; and others have denounced it as a usurpation of legislative prerogative, an unwarranted assumption of superiority over a co-ordinate department of government, and the exercise of an anomalous and mischievous function not permitted to courts anywhere else in the world.

These criticisms are generally rested on the assumption that the right of judicial censorship depends on a question between legislature and court as to which ought to be the final interpreter of the constitution with authority to impose its opinion on the other. If this were all, it would be

hard to sustain the right of a judge to intervene as a self assumed depositary of legal wisdom, to explain to the legislature what the people meant by language they addressed to the legislature telling it how to act. But the duty of the courts really depends on a different question, which arises not between legislature and court but between legislature and people, and concerns the extent to which the legislature may control the people's conduct. The citizens who are elected to the legislature have no right of rule except what their fellow citizens have given them.

When delegates to a nominating convention are instructed to vote for one candidate or for another, the instructions are intended to impose a moral obligation, but the delegates may disregard them without affecting the validity of their votes. It is different when a private agent receives instructions from his principal as to the kind of business in which the agent may engage. The instructions set a limit, not merely to the agent's duty, but to his power as well. Let him go a step beyond their scope, and though his acts purport to be in his employer's interest and behalf, they are void of effect. How is it with the clauses of state and federal constitutions which forbid the establishment of state religion, the abridgment of freedom of speech, and the deprivation of life, liberty or property without due process of law? Are they mere expressions of the people's wish, taking effect only by way of trust and confidence, in whose violation it is the legal duty of a citizen to acquiesce, yielding obedience to a command of the legislature to the people though in direct opposition to the command of the people to the legislature? Or do these clauses, like instructions to a private agent, set limits to the authority vested in the men we send to the capitol to make laws for the general good which they cannot overpass without losing legislative power, so that acts in excess of a constitutional restriction are, for most purposes, only resolutions of a mass meeting, impotent to confer on any one a legal right or to impose on any one a legal duty? Between these two positions there is no middle ground. The power of the legis-

lature is limited or unlimited. So far as it is unlimited, the legislature when elected becomes supreme over the individual, a despot crowned by plebiscite. If limited, the individual, so far as the limit extends, is exempt from legislative control; and a court can have in general no right to enforce against him a law it thinks unauthorized, unless it is itself subordinate to the legislature so as to be bound to follow the legislature's opinion or to enforce the legislature's will.

In many countries the framers of law are regarded as possessing unrestricted power, as holding in their hands the life and liberty of every citizen, who owes obedience to their most monstrous and arbitrary edict, until, by sounder judgment, the edict is repealed. A minority can only trust to the forbearance of those who hold law making power. When that fails it can only resist by force. Such was the view of those who framed the constitution of the first French republic. They inserted a declaration of the rights of man more elaborate than any bill of rights we have. They attempted to secure its observance by directing that it be "written upon tablets and placed in the midst of the legislative body and in public places," that "the people may always have before its eyes the fundamental pillars of its liberty and strength, the authorities the standard of their duties and the legislator the object of his problem." As a further protection to the citizen the constitution was expressly placed "under the guaranty of all the virtues": a weak defense, it has been said, to an assault by all the passions. Its speedy collapse in the hour of need is illustrated by a decree passed on the trial of Danton "authorizing juries to declare themselves satisfied of the guilt of persons accused at any stage of the proceedings against them": in other words, to condemn without hearing.[a]

But the framers of the French constitution did not fail to anticipate the possibility of the government's violating its trust, and expressly reserved to the citizen the sole pro-

a Bourke Cockran, John Marshall Centenary Address, I Dillon's Marshall, 407-408.

tection which on their theory of governmental power is capable of being bestowed upon him. They enacted that "resistance to oppression is the inference from the other rights of man. It is oppression of the whole society if but one of its members be oppressed. When government violates the rights of the people, insurrection of the people and of every single part of it, is the most sacred of its rights, and the highest of its duties." (Bourke Cockran, sup.) "It would be well," said Mr. Roosevelt at Carnegie Hall, "if our people would study the history of a sister republic." He vividly described how in France "the whirlwind of the red terror induced a violent reaction," and how "with altenations of violent radicalism and violent Bourbonism, the French people went through misery toward a shattered goal." "All the woes of France," he said "have been due to the folly of her people in splitting into two camps of unreasonable conservatism and unreasonable radicalism."

Those who made our constitutions were of a different mind from the statesmen of France. The French view of the relation between government and citizen never prevailed in the United States. Said Judge Matthews in Yick Wo v. Hopkins:[1]

"When we consider the nature and the theory of our institutions of government, the principles upon which they are supposed to rest, and review the history of their development, we are constrained to conclude that they do not mean to leave room for the play of purely personal and arbitrary power. . . . The fundamental rights to life, liberty and the pursuit of happiness, considered as individual possessions are secured by those maxims of constitutional law which are the monuments showing the victorious progress of the race in securing to men the blessings of civilization under the reign of just and equal laws, so that, in the famous language of the Massachusetts Bill of Rights, the government of the Commonwealth 'may be a government of laws and not of men.' "

[1] 118 U. S. 356.

In this country, in short, constitutional restrictions limit the government's power, and not merely its duty,—limit what it can, not what it ought to do. Usurpation, intentional or inadvertent, is futile, for the citizen owes no duty to obey. His rights are unaffected. As individual possessions unparted with they are secure. And the courts are open to determine what they are and to protect them. For when one person is sued by another or prosecuted by the State itself, and controversy arises as to his legal rights, the court in the ordinary course of litigation must ascertain them according to the truth and give judgment to make the truth effective. That is what a court is for. If it is contended on one side that a certain statute has changed a party's rights, and on the other that it has not worked a change because unauthorized by the constitution, the court must determine which contention is true or abdicate its function of adjudication. If it believes the act was authorized it applies it; if not, it accords it no effect. There is nothing in this peculiar to statutes or to constitutions. It is an application of the general truth that if any officer or official body exceeds its authority to act for the community, which is called its jurisdiction, the act is void, whether it is the passage of an ordinance, the service of a writ, or the judgment of a court. A sound decision against the validity of a statute, judgment, or executive act is an enforcement, and not in any true sense an overruling, of the people's will. The people's authentic will constitutes law. It binds all their representatives. For that very reason they are bound to disregard acts in the people's name which assume to modify their will but can show no warrant from the people.

So far as a constitution is intended effectively to limit legislative power, so far it necessarily imposes on the court a duty to respect the limitation. For to vest in the legislature power to construe the restriction would reclothe it with the absolute control which it was the purpose of the limitation to take away; and, on the other hand, to compel a court to accept the legislature's interpretation would re-

quire it to surrender the duty of adjudicating upon the legal rights of parties for which it was created. In short, the question lies between the people and the legislature, and if it is true that a citizen owes no duty to obey an unconstitutional statute, a court has no right to compel obedience. Hamilton, in number seventy-eight of the Federalist, put the whole doctrine into a few words:

"There is no position which depends on clearer principles than that every act of a delegated authority, contrary to the tenor of the commission under which it is exercised, is void. No legislative act, therefore, contrary to the constitution can be valid. To deny this would be to affirm . . . that the representatives of the people are superior to the people themselves. . . . Nor does this conclusion by any means suppose a superiority of the judicial to the legislative power. It only supposes that the power of the people is superior to both; and that when the will of the legislature declared in its statutes stands in opposition to that of the people declared in the Constitution, the judges ought to be governed by the latter rather than the former."

This doctrine was early established and has been uniformly acted on. Though every state constitution has been framed or revised since then, not one has departed from it. Chief Justice Gibson of Pennsylvania, its ablest opponent, retracted his dissent, saying experience of its necessity had changed his mind.[2] It is an unfounded notion that in holding statutes invalid our courts perform a function not inherent in adjudication itself or exercise a power not possessed by courts in other countries. It is not a power of American courts that is in question, but a characteristic of American statutes. If in England, for instance, a question should arise, as well it might, in which the rights of the parties, having accrued in the United States, depended upon the laws there in force, it would become necessary for the English court to determine whether an American statute which, if valid, controlled the case, was valid or not; and for that purpose to pass upon its constitutionality, and to

[2] Thayer, Legal Essays, p. 2.

disregard it if unconstitutional, as a court in this country would. In Australia, where the American doctrine of legislative power prevails, courts hold statutes invalid as they do here.

If Federal courts had enforced the will of Congress as supreme law, the Constitution of the United States, it has been said, would not have been worth the parchment upon which it is engrossed. If the States had acted on the French theory of arbitrary power tempered by insurrection, the law reports indicate that we should see changes in government oftener than changes in the moon. We should either have to teach our governors self restraint more effectively than the courts have done, welcome wrong with suffering souls, or rush to arms in one jurisdiction or another sixty-seven times a year. For time and again, taxes have been levied for private benefit, cities intentionally rendered unable to pay their debts; rights solemnly granted have been deliberately violated; out of fear or favor for influential classes, tyrannical restrictions have been laid on the community at large, and persons with little political influence deprived of important rights. Carelessness has been fertile in enactments whose incidence has been arbitrary and oppressive. In the single state of Illinois, the Supreme Court held, in the single year 1911, that the legislature had violated the state constitution eleven times, and most of the violations were palpable. Whether or not experience demonstrates that constitutional restraint on legislative power is salutary, it abundantly demonstrates that, if it is attempted, court control is necessary to make it real.

Recent criticism of constitutional decisions has centered around two cases, the so-called Bakeshop case, and a Workmen's Compensation case in New York. In each, a state statute was held void for violating a provision against depriving any person of life, liberty or property without due process of law.

The due process clause does not mean that the forms of legal procedure which at a given time happen to be prescribed by law shall be followed by the officers charged with

the law's enforcement. That would be superfluous in a country where no officer has authority except under the law. It secures, not the due and proper observance of established rules, but the establishment of none but due and proper rules, rules consistent with the theory of a government that holds its powers for the common good and acknowledges a duty to protect each and every citizen from injustice and oppression.

In the Bakeshop case[3] the defendant had been fined fifty dollars for violating an enactment of the New York legislature that no employee in a bakery or in a confectionery establishment should be permitted to work more than sixty hours in a week. The statute was denominated a labor and not a health law, and under it persons who sold goods over the counter in bakeshops and candy shops would seem to have been treated differently from those who sold in other shops, and persons who worked in the kitchens of such shops differently from those who worked in kitchens of restaurants or hotels. A majority of the New York judges and a minority of the judges of the United States Supreme Court, when the case came there on error, upheld the law because they thought it might reasonably be deemed an appropriate measure for the protection of health. But Judges Peckham, Fuller, Brewer, Brown and McKenna, a majority of the Supreme Court, were clear that the law was a pure and simple regulation of the hours of labor in a particular industry, and rested their decision against it on the principle that to limit the hours that a man may work for reasons unconnected with physical or moral well being is an interference with individual freedom that exceeds the due limits of governmental power, and consequently a deprivation of liberty without due process of law within the fourteenth amendment to the Constitution of the United States.

If the act clearly were, as the court hint it was, intended to prevent an ambitious baker working harder than suited

[3] Lochner v. New York, 198 U. S. 45, 177 N. Y. 145, 73 App. Div. 120.

the convenience of his fellow craftsmen, probably few would quarrel with the court for holding it void. But the ground on which the decision was rested seems to involve the sweeping doctrine that limitation of working hours for social or economic, as distinguished from moral or sanitary reasons (for instance, the general establishment of an eight hour day), is among the things which the people of the United States have forbidden to the people of the States.

It is not the purpose here to criticise that doctrine, nor to indulge in conjecture as to whether it will command the assent of the court in future, but only to point out the position which the judges took. Of those who passed on the case on appeal, nine supported the act as probably or possibly a health law and expressed no opinion of its validity as a mere labor law. Ten expressed an opinion that a state cannot regulate hours of labor as such. Only two, Judge Alton B. Parker in the Court of Appeals and Judge Holmes in the Supreme Court dissented from that proposition; so that although the judges were divided eleven to ten on the question of fact as to what the legislature had done, only two out of twenty-one dissented from the legal doctrine as to what the legislature had power to do, on which the decision turned. It is therefore untrue to say, as has lately been said, that "in the Bakeshop case, the Supreme Court of the United States, by a majority of five to four, took the ground that the people of the State of New York did not have the right, when they found certain conditions to be unhygienic, and so declared through the legislature, to prevent men from working for too many hours under these unhygienic conditions." No judge took any such ground.

It is incorrect, also, to say that the decision violates the often declared rule that a statute will not be held unconstitutional unless it is evidently so, and that "It is a rank absurdity to hold that the violation of the constitution is 'evident' in a case in which the present Chief Justice of the United States and enough of his colleagues to come within one of a majority hold most strongly the opposite view." This is confusion of thought as well as misstatement

of fact. A jury in a criminal case is told to acquit unless guilt is proved beyond reasonable doubt. That does not mean that if one or more jurors think the prisoner innocent, all should acquit because the difference of opinion shows reasonable doubt. It means that each juror shall be clear in his own mind. The rule that a statute to be held void must clearly be bad means that each judge of a majority shall be clear in his own mind. It is supposed to be the duty of a judge to make up his mind for himself and not to let his decision be controlled by the opinion of anybody else. What would be a rank absurdity would be to direct a jury to acquit if they could not agree, and it is a ranker absurdity to suggest that a judge ought to acquiesce in what he believes to be a violation of constitutional right and a denial of justice to the parties before him, because some of his colleagues think differently. If this needed to be settled, it was settled in 1827, in Ogden v. Saunders[3a].

In the Workmen's Compensation case[4] the New York Court of Appeals held invalid a statute which, as the court said, made the employer in certain industries "responsible to the employee for every accident in the course of the employment whether the employer was at fault or not." The decision disappointed many who had given thought to the characteristics and tendencies of the present industrial system. They deemed the establishment of employer's liability for accidental injury a necessary step toward relieving a situation productive of social injustice and economic loss, disastrous to the workman and mischievous to the community. They also saw in the decision an obstacle to other reforms. Their disappointment was bitter, and so was their criticism. They said that the legislature had appreciated what the court had not, the hardship of the disabled workman's lot and the evils to society which resulted, and that the considerations of public welfare which required the statute should suffice to support it.

In order to see the question as the judges saw it, let us assume for the moment that the legislature, actuated by

[3a] 12 Wheaton 213. [4] Ives. v. So. Buffalo Ry. Co., 200 N. Y. 271.

sympathy for the injured workman, looked around to find the nearest rich man on whom to shift the burden of the loss, and found him in the employer. The motive is commendable, but unquestionably, if that is all, the act is not due process. If the public determines that compensation shall be made, the public, perhaps, may make it. If compensation were of direct public advantage that would justify the legislature in providing for it, but would not in any degree justify providing for it at the sole expense of an individual or set of individuals selected in arbitrary fashion. Where the question is whether the legislature's object is legitimate, it is material to consider whether that object is to benefit an individual or to benefit the public. Speaking generally, government cannot impose a burden on the public for the mere benefit of an individual. But for a public benefit it can. This is what those who weigh their words mean when they say that the requirement of due process does not cut down the power to promote public welfare, or to use the customary occult phrase, the police power. They mean that although a taking of property which tends to private benefit only is generally a taking without due process, yet, a taking which tends directly to public benefit is unobjectionable so far as the object is concerned. But when the validity of a law is considered with reference to the means employed to secure the object, the fact that the law will result in public benefit, secure justice, or promote health or morals is often of no importance at all. So far as concerns the object of a law, the due process clause does not cut down police power. So far as concerns the means employed, it does. In truth, its primary purpose and effect is to say to the government, "You shall not promote public welfare by means which are arbitrary, oppressive or violative of fundamental principle."

Said Judge Harlan in Connolly v. Union Sewer Pipe Co.:[5] "No right granted or secured by the Constitution of the United States can be impaired or destroyed by a state enactment, whatever may be the source from which the power

[5] 184 U. S. 540.

to pass such an enactment may have been derived. . . . The State has undoubtedly the power by appropriate legislation to protect the public morals, the public health and the public safety, but if by their necessary operation, its regulations looking to either of these ends amount to a denial to persons within its jurisdiction of the equal protection of the laws, they must be deemed unconstitutional and void.'' It is evident, for instance, that one of the things intended to be accomplished by the fourteenth amendment was to prevent the former slave states from resorting to oppressive and discriminatory methods of maintaining order and working out their social problems. It was intended to preclude such a law as that passed in Massachusetts two hundred years ago ''for the better preventing of a spurious and mixed issue,'' which sought to further that commendable object by providing that ''if any negro or mulatto shall presume to smite or strike any person of the English or other Christian nation, such negro or mulatto shall be severely whipped at the discretion of the justices before whom the offender shall be brought.'' Whatever that ''prevailing morality or strong and preponderant opinion,'' of which Judge Holmes has spoken, ''may hold'' two centuries hence ''to be greatly and immediately necessary to the public welfare,'' it is certain that for some time to come severely whipping at discretion for an offense by a negro against a white man, not so punished when committed by a white man or against a negro, will be deemed an illegitimate method of preserving racial purity, and that for as long a time taking property from a person who is supposed to be properous in order to give it to one in adversity will have to be justified by further reasons than that it is a method of preventing economic waste and establishing social justice. It will be necessary to point out in what relevant respect making an employer pay for an accident to his workman at work differs from making him pay for an accident to his workman at play, to his workman's wife, or to his workman's house. It is hard to see a difference in the hardship that falls on the

workman, in the burden that having to pay for it would put on the employer, or in his ability to shift the burden to the consumer. It will be well to inquire whether the principle invoked to support workmen's compensation will extend to making a landlord pay if a tenant falls down stairs and breaks his leg, or to making any person pay any other who meets with accident in the course of mutual dealings.

It is by no means intended to intimate that the Ives case is right and that there is no justification for selecting the employer as a person to bear the burden of an accident to a workman which is nobody's fault. The employer generally controls the premises. He has a right to direct the workman's acts. He has a quasi ownership of the workman's services, and is like a borrower of the workman's person. May not society make the borrower an insurer, or place one who uses men to do his work in a like condition as to risk of accident as if he had used his own or another's horses or machines? If the product is tangible it is the employer's property; if intangible, the work enures to his benefit. May not manufacturing risk properly be placed upon the owner of the product? But granting that the decision is wrong, its critics would do better to try to point out where the error lies than to misapply phrases about police power or to denounce, as devotees of an outworn political philosophy, judges who are unwilling to acquiesce in what is *prima facie* benevolent spoliation.

It has been plausibly said that constitutions should be a means of securing, not of thwarting, "the right of the people to rule themselves and to provide for their own social and industrial well being," and that the people should be free "to enact into law any measure they deem necessary for the betterment of social and industrial conditions." One who believes the latter statement is probably in favor of striking the prohibition of slavery out of the constitution, in order that if the people come back to the opinion once held in the South, that social and industrial conditions are better when the blacks are slaves than when they are free, there may be no constitutional obstacle to thwart the

people's right to provide for their well being by re-establishing slavery. The main purpose of constitutional restrictions is to promote well being by making sure that what is done shall be in accordance with principles of fair dealing and of regard for individual welfare which on particular occasions we are prone to overlook. The restriction rightly or wrongly applied in the Ives case was imposed by the people in the exercise of their right to ensure the wisdom and justice of their rule.

We are prone to think that popular government means popular liberty. But it has been often pointed out that it is not the form of government but the laws which the government makes upon which the liberty and welfare of the people depend. Given the laws, it makes little difference what was the form of government that made them. We have statutes which punish unintended acts by imprisonment or fine, from selling milk which turns out to be below standard to committing bigamy by marrying in a well warranted but mistaken belief that one's former spouse is dead or divorced. It might seem better to send to jail the judge who signs a void decree of divorce than the woman who marries again in reliance on her husband's having obtained it, but the instance is only one among many in which punishment is decreed against the innocent in order to avoid the necessity of proving the guilt of the guilty, lest by feigning innocence they might escape. Constructive treason fell because it was men of influence who were likely to be accused. We have defined treason narrowly in the constitution because they were interested in having it defined. But the creation of constructive misdemeanors goes on, and it is the poor and ignorant who are most likely to be punished. That distinct zoological species known as the criminal class may be treated too tenderly in criminal procedure, but it finds little sympathy anywhere else, though there is hardly a man who has not commited a series of technical crimes. What were the motives which induced and the sense of justice which permitted the legislature of a single state within the past few years to enact, in a case where the constitution

gave a right to jury trial, that the jury might meet without notice to one of the parties, render their verdict, and then give him a chance to convince them they were wrong? To make it a crime for sellers to combine to raise prices, but permit them to commit that crime to the damage of the community, if it would benefit their workmen by raising wages? To create public employment offices at public expense and forbid their use to get work at or workmen for an establishment where there was a strike? To forbid contractors on public works to hire aliens? To make it a penal offense to buy an article with the owner's consent, provided the article is a bottle with a registered trademark, the consent is oral, and the bottle empty? To make the possession of such an empty bottle sufficient evidence of crime, provided the possessor deals in junk? To permit farmers to retain the right of holding back wages because of debts due from their workmen and prohibit everybody else from doing so? To empower a tax assessor to tax for misconduct? To permit owners of land in a drainage district to act as assessors and apportion the cost of drainage between their own lands and their neighbors? To give a monopoly to shopkeepers by requiring peddlars of a certain article to pay a license fee of one hundred dollars a month? And to make an owner who has paid for his house in full liable against his known will for the price of materials sold to and used by the builder?[6]

The maxim that the end justifies the means is pushed far in government. The primary object of security to all is so easily forgotten in the desire to promote the advantage of the many that, even when an attempted violation of the constitution obliges a court to protect an individual against injury caused by the government's wish to do a good thing in a bad way, the court is apt to be denounced for mischievous interference. To drive an engine at full speed to

[6] Wabash R. Co. v. Drainage District, 194 Ill. 310; P. v. Foundry, 201 Ill. 236; Matthews v. P., 202 Ill. 389; Chicago v. Hulbert, 205 Ill. 346; Horwick v. Laboratory, 205 Ill. 497; Kellyville Co. v. Harrier, 207 Ill. 624; Cleveland R. Co. v. P., 212 Ill. 638; Commissioners v. Smith, 233 Ill. 417; P. v. Wilson, 249 Ill. 195; Kelly v. Johnson, 251 Ill. 135.

a fire, reckless of who is run over in the street, may become punishable as criminal homicide; but there is little to restrain lawmakers from attempting to secure desirable ends by the quickest and easiest means. The American colonists were driven to revolt because the English government was administered in the interest of the mass of the people, without due regard to the interests of a class—the people of the colonies—who had no adequate way to make their interest known and felt. Our constitutions are framed to guard as well as may be against a future like misuse of power. Their framers did not stop with provision for popular control. To frame the government so that the opinion of a majority is quickly reflected in law tends to secure the many against injustice at the hands of a few, but gives no sure protection to the few against the many. The farther the functions of government extend, the fewer are its citizens whose interest does not in some point lie with a minority. The present movement for better government, founded in sympathy for all, confident in its determination to see justice done for all, and desirous to strengthen the powers of government that it may more quickly serve that purpose, will need the wisdom of self restraint not to sacrifice to the desires of today securities that will be necessary for the justice of tomorrow. Some think the people at large will in the long run be more keenly alive to justice and the future's needs than will the men whom they select to hold the high office of judges over them. They think it the nature of a judge to be mentally paralyzed by precedent and the pressure of existing institutions. They adduce the Dred Scott case in illustration, and say that until the people virtually overruled it progress was blocked. No doubt, had it been submitted to them, the people would have overruled the propositions which Judge Taney there laid down, that a negro, though free, could not be a citizen of the United States, that our constitution was not framed for the benefit of all who were born and lived under its laws, and that the members of a race might owe allegiance to our government and yet not be entitled to citizenship or to the

protection for personal rights which many guarantees of its constitution afford. Yet a generation later the Supreme Court reaffirmed the principle and applied it to Porto Rico and the Philippines. If the doctrine that "the people of the United States" does not include all freemen born and living under its government had really been overruled, we should, for good or ill, have been shorn of power to hold colonies to advantage. It is not by the desires of a day or of a generation that constitutions are to be construed. If we praise Chief Justice White's decision, we cannot consistently denounce Chief Justice Taney's views as behind the times.

The delimitation of the powers of state and nation, made by the Supreme Court in a century of decisions, is today admitted to have been in its main lines essential to the nation's progress, and is generally believed to have translated into living reality the conceptions and purposes of its founders. If their decisions had been dependent on popular approval, it is likely that much of the work of Marshall and his colleagues would have been swept away. For the greater part of Marshall's term the opposite party controlled Congress and possessed the Presidency. After 1811, a majority of his colleagues differed with him in politics. Yet they reached the same solution of constitutional problems and most of their work has stood the test of time.

The saying that law lags behind the community's advance is less than half true. Of course, an institution lasts until men have not only formed but acted effectively on an opinion against it. But the history of the law of trusts and fraud continually shows a putting into effect of standards in advance of average morality. It was the courts who from Tudor times established the duties of public service which the interstate commerce act has developed, and the rules of restraint of trade from which the anti-trust act draws vitality. They taught corporate directors their trusteeship, and have set their faces steadily against the many forms of unconscionable profit taking by fiduciaries which have been widely practiced and properly condoned. In calling

legislatures to account courts only give an instance of the scrupulous enforcement of obligation which has made them by precept and example the leading public influence for truth and honor.

The recall of decisions proposes to amend state constitutions so as to provide that when a given statute has been held void the question may be submitted for popular vote whether, notwithstanding the holding, it shall be valid for the future. If the vote is in favor of the statute, a wrong decision will thus be neutralized for future cases, a right decision rendered inapplicable by creating a special exception to the constitution, opening up its prohibition to let the particular measure pass. A voter who votes for the statute thinking the decision wrong votes as a judge interpreting the constiution. He exercises judicial power. If he thinks the decision right, he votes as an amender of the constitution and exercises legislative power. Generally he will simply vote for the stautute if he likes it and against it if he doesn't. Nobody can tell what he is trying to do, but the judges will treat the constitution as amended so as to permit the act.

Constitutional protection is diminished where amendment is by majority vote, and is minimized where the question submitted is not a proposed change in legislative power, expressed in general terms embodying a principle, but is whether a particular statute shall be law. If a vote were taken as to whether the legislature should have power to reduce railroad fares below cost of transportation, the answer would probably be negative; but if the vote were whether fares should be fixed at two cents a mile, it would be much more likely to carry, even after a court had held the rate too low. Personal interest generally controls opinion. We trust our judgment against the umpire's when he rules against our team. Most men who lose lawsuits think they should have won. And many would stick to an opinion that a railroad could make shift to carry them at two cents a mile, though investigation had satisfied judges to the contrary. This would hold wherever the interest or prejudice of a majority was at stake.

In theory the use of recall should be limited to statutes passed in the belief they were constitutional, for a legislature cannot honestly enact a law it does not think the constitution permits. But there would be no way to detect the legislature's opinion, and it would be possible for any sort of law to be passed and enforced with the object of securing ratification from the people after a court had held its passage and enforcement illegal, concealing the impropriety of the procedure under the assertion, which could hardly be disproved, that the popular vote which gave the law a certificate of constitutionality for the future was a vote that it had been constitutional from the beginning. The pressure to pass unauthorized laws would probably increase to the destruction of the already scant respect which legislators show for constitutional objections to measures believed to be popular. It would increasingly throw on the courts, whose alleged relative unfitness for the duty is the pretext for the recall, the burden of deciding questions of constitutionality which legislators are in duty bound to determine in the first instance for themselves. It is a serious drawback to constitutionality being a question for courts that it tends to reckless lawmaking, the legislature relying on the court to correct its excesses. At present, courts have final decision and responsibility. The recall would take decision from them and scatter responsibility to the wind. The argument used for any doubtful measure backed by interest, reputable or disreputable, "Pass it, and if it is unconstitutional, the court will hold it bad," would be reinforced by the argument, "Pass it, even if it is unconstitutional, for the people are entitled to vote it into validity." The legislature would look to the people and the people would take it for granted that the measure was proper or it would not have been passed. When the majority's power of overruling decisions and making exceptions to the constitution had come to be a matter of course, laws might come to be passed without regard to constitutional warrant, and ratified, if popular, without regard to decisions against them. The recall, like the choice of President by electors,

is capable of becoming in fact something different from what it is in form. Under a system which puts direct control in the voter's hands the opinion of judges might almost count for as little as the opinion of Presidential electors does. State constitutional limitations would be amendable by majority vote. They would be amendable by the enactment not of principles but of particular measures. They would be amendable under the guise of interpreting them. Their value and effectiveness might be destroyed. For constitutional limitations, as we have them, give us; first, established principles to which laws must conform; second, a means of carefully testing laws and analyzing their true character to determine whether they really do so conform; and, third, security against departure from conformity except of set purpose through amendment by a method designed to secure due regard to the interests of everybody. All these things would be broken in upon. It may be that they are not worth keeping, and that under a legislature with power to do anything a majority of the voters are willing to ratify we should have better government. But we ought to face the possibilities of the situation. In fact, if we adopt the recall of decisions all that will be necessary to wiping out constitutional guarantees altogether will be a single statute making it the duty of courts to enforce all laws thereafter passed and a ratification of that statute at the polls after the judges have refused to put it into effect. If the recall were applied to Federal decisions, a similar act of Congress similarly ratified would give Congress power to make laws on all subjects whatever.

The main professed purpose of the recall of decisions is to nullify unsatisfactory rulings under the due process clause. To make it thoroughly effective for this purpose would also require an amendment to the federal constitution permitting the people of a state to recall a decision of the state court rested on the federal due process clause. For otherwise, unless there happened to be controlling authority on the very point, the state court could rest its decision against the validity of a state statute on the fourteenth

amendment and it would be immune from recall by the people of the state, as they could neither change the federal constitution nor direct the court to disobey it. Even after such an amendment, an adverse decision of the federal supreme court would still annul the statute.

The purpose can be sufficiently accomplished in a simpler and better way. It has been pointed out[7] that in a state where decisions as to due process are unsatisfactory all may be set right, so far as is possible by anything the people of the state may do, by striking the due process clause from the state constitution and relying on the protection against arbitrary legislation which the like provision in the federal constitution amply affords. An act of Congress could permit a review by the federal supreme court of a state court's ruling against a statute under the fourteenth amendment as it now permits review of a ruling in the statute's favor. Or, instead of repealing outright a state due process clause it might be in some respects better to amend it, to read that no act shall be held invalid as denying due process or equal protection of law except under the fourteenth amendment to the constitution of the United States.

Another method undoubtedly effectual in the long run to keep the court from unduly limiting the legislature's authority is the amendment lately submitted in Ohio which requires the state court of last resort to uphold a statute if two judges think it valid.

Granting that in some states courts seem committed at present to too narrow a view of governmental power, still we may be confident that present methods of amendment, the people's control over the personnel of the bench, the susceptibility of judges' minds to reason, and the wholesome influence of discussion such as the country has been having of late will be enough to remove just discontent without sacrificing the benefits of our present system.

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[7] Dr. W. F. Dodd, 6 Illinois Law Review, 289; 10 Michigan Law Review 79.